UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

----------x

ALMEIN CAIN,

Petitioner,

MEMORANDUM AND ORDER

-against-

Case No. 02-CV-3956 (FB)

VICTOR T. HERBERT, Superintendent, Fishkill Correctional Facility,

Respondent.

----------x

APPEARANCES:

For the Petitioner:
ALMEIN CAIN, *pro se*
Attica Correctional Facility
P.O. Box 149
Attica, NY 14011-0149

For the Respondent:
RICHARD A. BROWN, ESQ.
District Attorney, Queens County
By: JENNIFER F. FRIEDMAN, ESQ.
Assistant District Attorney
125-01 Queens Boulevard
Kew Gardens, NY 11415

BLOCK, District Judge:

On July 3, 2002, Almein Cain ("Cain") filed this petition, *pro se*, seeking a writ of habeas corpus pursuant to 28 U.S.C. § 2254, challenging his 1997 conviction in Queens County. The Court ordered Cain to show cause why the petition should not be dismissed as time- barred. *See* Memorandum and Order, No. 02-CV-3956, August 30, 2002. In particular, the Court required the date Cain had filed a motion for error *coram nobis* in order to ascertain whether the petition was timely filed. *See id.* at 3. Cain submitted an affirmation on September 22, 2002, simply stating that he filed the motion on July 10, 2001. *See* Pet. Affirmation, at 4. On this basis, Magistrate Bloom concluded his *habeas* petition was timely, and she issued an order that the petition be served on respondent. *See* Order, No. 02-CV-3956, December 27, 2002.

Respondent thereafter moved to dismiss the petition as time-barred, and submitted documentation in support of the motion that demonstrated that Cain's motion for error *coram nobis* was filed on December 17, 2001, not July 10, 2001. *See* Resp. Reply, Ex. 1-3. Using December 17, 2001 as the filing date in the calculus set forth in the Court's August 27, 2002 Memorandum and Order, Cain's petition would be untimely. *See* Memorandum and Order, No. 02-CV-3956, at 3-4.

The statute of limitations for filing a *habeas* petition is tolled for the "time during which a *properly filed application* for State post-conviction or other collateral review . . . is pending." 28 U.S.C. § 2244(d)(2) (emphasis added); *see Artuz v. Bennett*, 531 U.S. 4, 8 (2000) ("[A]n application is 'properly filed' when its delivery and acceptance are in compliance with the applicable laws and rules governing filings."). State law controls the question of when a post-conviction motion is considered properly filed. *See Moore v. Gibson*, 250 F.3d 1295, 1297 (10th Cir.), *cert. denied*, 534 U.S. 1000 (2001); *Rosario v. Bennett*, No. 01-CV-7142, 2002 WL 31852827, at *15

(S.D.N.Y. Dec. 20, 2002). In New York, the date of filing is the date the motion is received by the clerk of the court; it is not the date that the prisoner gives the document to corrections authorities for filing. *See* N.Y.C.P.L. 304, *Grant v. Senkowski*, 95 N.Y.2d 605, 608 (2001) (rejecting federal "prisoner mailbox rule" in which "the term 'filing' would be redefined to mean the delivery of a notice of petition or order to show cause by a pro se prisoner to prison authorities for forwarding to the appropriate court"). Here, Cain's motion for error *coram nobis* was properly filed on December 17, 2001, the date it was received by the clerk of the Second Department. *See* Resp. Reply, Ex. 3 (Notice of Motion for Writ of Error Coram Nobis) (stamped "Received" in Second Department on December 17, 2003).

The petition should be deemed untimely, unless Cain can demonstrate that the statute of limitations period should be equitably tolled because (i) "extraordinary circumstances prevented him from filing his petition on time," and (ii) he "acted with reasonable diligence throughout the period he seeks to toll." *Smith v. McGinnis*, 208 F.3d 13, 17 (2d Cir. 2000) (*per curiam*) (citing *Johnson v. Nyack Hosp.*, 86 F.3d 8, 12 (2d Dept 1996)), *cert. denied*, 531 U.S. 840 (2000); *see also Valverde v. Stinson*, 224 F.3d 129, 133 (2d Cir. 2000) (determining confiscation of legal papers sufficient to establish potential basis for equitable tolling). Although it appears that Cain prepared his motion in July 2001, *see* Resp. Reply Ex. 1 (motion, with typed date July 10, 2001), he offers no explanation for the time lag between the date he prepared his papers and the date they were filed, other than to claim that "the Respondent seems to be manufacturing a date of December 17, 2001." Pet. Traverse, at 4. The documents submitted by respondent belie Cain's ignorance of the date the motion was actually filed: Cain's signature on his moving papers is notarized

on December 7, 2001. *See* Resp. Reply, Ex. 1-2. This is not a circumstance that warrants a finding of equitable tolling.

Since Cain's motion for error *coram nobis* was filed on December 17, 2001, his *habeas* is untimely. The petition also would be untimely even if the Court computed the tolling of the statute from December 7, 2001, the date Cain's signature was notarized. Therefore, the petition is dismissed. *See* 28 U.S.C. § 2244(d).

SO ORDERED.

Dated: Brooklyn, New York
April 7, 2003

E.D.N.Y.
02-CV-3956
Block, J.

United States Court of Appeals
FOR THE
SECOND CIRCUIT

At a stated Term of the United States Court of Appeals for the Second Circuit, held at the Thurgood Marshall United States Courthouse, at Foley Square, in the City of New York, on the 10th day of November, two thousand three,

Present:

Hon. Richard J. Cardamone,
Hon. Sonia Sotomayor,
Hon. Robert A. Katzmann,
Circuit Judges.

Almein Cain,

Petitioner-Appellant,

v. 03-2319

Vincent T. Herbert,

Respondent-Appellee.

Appellant, *pro se* and *in forma pauperis*, moves for a certificate of appealability from the district court's order dismissing his 28 U.S.C. § 2254 petition as timed barred under the Anti-Terrorism and Effective Death Penalty Act ("AEDPA"), Pub. L. No. 104-132, 110 Stat. 1214 (1996). Upon due consideration, it is ORDERED that the motion is granted on the issue of whether the prison mailbox rule applies to state filings that toll the AEDPA's statute of limitations. Counsel will be assigned pursuant to the Criminal Justice Act, after which time a scheduling order will be issued. This case will be heard in tandem with *Artuz v. Fernandez*, No. 03-2541 in which this Court is considering the same issue. If Fernandez moves for appointment of counsel, and a panel grants that request, the same counsel should be appointed in both *Cain v. Herbert*, No. 03-2319 and *Artuz v. Fernandez*, No. 03-2541.

FOR THE COURT:
Roseann B. MacKechnie, Clerk

By: Lucille Carr

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

(Decided: March 17, 2005)

Docket No. 03-2319

ALMEIN CAIN,

Petitioner-Appellant,

v.

VINCENT T. HERBERT, Superintendent,

Respondent-Appellee.

Before HON. DENNIS JACOBS, HON. SONIA SOTOMAYOR, HON. PETER W. HALL, Circuit Judges

UPON DUE CONSIDERATION, IT IS HEREBY ORDERED, ADJUDGED AND DECREED that the judgment of the district court be **VACATED** and **REMANDED** for proceedings consistent with this order and this Court's opinion issued today in Fernandez v. Artuz, 03-2541.

Almein Cain appeals from a judgment of the United States District Court for the Eastern District of New York (Block, J.), dismissing as untimely Cain's petition for a writ of habeas corpus. We assume familiarity as to the facts, the procedural context, and the specification of appellate issues.

This case turns upon whether Cain's state coram nobis petition is deemed "properly filed" (within the meaning of 28 U.S.C. § 2244(d)) on the date it was delivered to prison authorities for mailing, or on the date it was received by the state court. For the reasons stated in our opinion issued today in Fernandez v. Artuz, 03-2541, we find that the prison mailbox rule applies. It is not altogether clear from the present record what the filing date is when the prison mailbox rule is applied, as Cain's application for the state writ consisted of documents bearing three different dates.

The record is clear, however, with respect to the date upon which Cain filed his federal habeas petition. This Court also applies the prison mailbox rule to fix the date on which a federal habeas petition is filed. Adeline v. Stinson, 206 F.3d 249, 251 n.1 (2d Cir. 2000) (per curiam" ("When a prisoner is proceeding pro se . . . federal courts generally consider his or her petition for habeas corpus to have been filed as of the date it was given to prison officials for forwarding to the court clerk."). Cain's federal habeas petition was therefore filed on June 26, 2002 (the date Cain delivered his petition to prison officials) rather than on July 3, 2002 (the date the petition was received by the district court).

The judgment of the district court is hereby **VACATED** and **REMANDED** for proceedings consistent with this order and this Court's opinion issued today in Fernandez v. Artuz, 03-2541.

(2)

No. 04-1726

Supreme Court, U.S.
FILED
AUG 24 2005
OFFICE OF THE CLERK

In The

Supreme Court of the United States

VINCENT T. HERBERT,

Petitioner,

v.

ALMEIN CAIN,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Second Circuit

BRIEF IN OPPOSITION

J.L. POTTENGER, JR.
Counsel of Record
BRETT DIGNAM
THE JEROME N. FRANK LEGAL SERVICES ORGANIZATION
P.O. Box 209090
New Haven, CT 06520-9090
(203) 432-4800

COCKLE LAW BRIEF PRINTING CO (800) 225-6964
OR CALL COLLECT (402) 342-2831

QUESTIONS PRESENTED

1) Whether the Second Circuit properly followed *Slack v. McDaniel* in exercising jurisdiction over an appeal from the dismissal of a habeas corpus petition on timeliness grounds only after the petitioner had made a "substantial showing of the denial of a constitutional right," as required by 28 U.S.C. § 2253(c)(2)?

2) Whether a federal court, when calculating tolling time under 28 U.S.C. § 2244(d)(2), should apply the federal prison mailbox rule to a *pro se* prisoner's "properly filed" application for state relief where state law poses no deadline for filing such applications?

TABLE OF CONTENTS

Page

QUESTIONS PRESENTED i

TABLE OF CONTENTS ii

TABLE OF AUTHORITIES iv

COUNTERSTATEMENT OF THE CASE 1

REASONS FOR DENYING THE WRIT 7

I. The Second Circuit Properly Exercised Jurisdiction Over Respondent's Habeas Appeal, Consistent With This Court's Decisions In *Slack v. McDaniel* And *Miller-El v. Cockrell*, As Well As With The Holdings And Practices Of Other Circuits. 7

II. The Second Circuit's Unpublished Order Applying The Prison Mailbox Rule To Cain's *Coram Nobis* Application Does Not Merit Supreme Court Review Because The Order Is Consistent With This Court's AEDPA Jurisprudence And Has No Effect On New York Law Or Procedure. The Fact That Only A Few Circuits Have Addressed This Prison Mailbox Issue, Under A Variety Of Factual Circumstances And Dependent Upon Idiosyncrasies In State Procedural Rules, Further Counsels Against Review Until A Clear Pattern Of Decisions Emerges. 17

A. Because Cain's *coram nobis* application was properly filed under New York law, and the Second Circuit's ruling applies only to the federal proceedings, the decision will have no effect on New York state law or procedure. 17

TABLE OF CONTENTS – Continued

Page

B. All but one of the Circuits that have addressed this issue agree that state law should not control how federal courts calculate time tolled under AEDPA's statute of limitations. 20

C. Applying the federal mailbox rule to state postconviction proceedings for the purpose of calculating federal tolling time under AEDPA follows *Houston*'s mandate to treat *pro se* petitioners fairly, and furthers the principles of comity and federalism. 24

CONCLUSION 30

TABLE OF AUTHORITIES

Page

CASES

Adams v. LeMaster, 223 F.3d 1177 (10th Cir. 2000), *cert. denied*, 531 U.S. 1195 (2001) 20, 21, 23, 26

Allen v. Lee, 366 F.3d 319 (4th Cir. 2004) (*en banc*) 16

Anthony v. Cambra, 236 F.3d 568 (9th Cir. 2000), *cert. denied*, 533 U.S. 941 (2001) 20, 21

Artuz v. Bennett, 531 U.S. 4 (2000) 6, 18

Baldayaque v. United States, 338 F.3d 145 (2d Cir. 2003) 12

Bond v. Walsh, No. 01-CV-0776, 2002 WL 460046 (E.D.N.Y. Feb. 12, 2002) 12

Brigian v. Artuz, No. 01-2389, 37 Fed. Appx. 559 (2d Cir. Jun. 18, 2002) 12

Cardenas v. Dretke, 405 F.3d 244 (5th Cir. 2005) 15

Casanova v. Dubois, 304 F.3d 75 (1st Cir. 2002) 29

Catlett v. Greiner, No. 02-2121, 76 Fed. Appx. 345 (2d Cir. Jul. 2, 2003) 13

Centobie v. Campbell, 407 F.3d 1149 (11th Cir. 2005) 15

Coleman v. Johnson, 184 F.3d 398 (5th Cir. 1999), *cert. denied*, 527 U.S. 1057 (2000) 20, 21, 22, 23

Coleman v. Thompson, 501 U.S. 722 (1991) 28

Cooper v. Brookshire, 70 F.3d 377 (5th Cir. 1995) 27

Cyars v. Hofbauer, 383 F.3d 485 (6th Cir. 2004) 16

Dalton v. Battaglia, 402 F.3d 729 (7th Cir. 2005) 16

Darryl Gadson v. M. McGinnis, No. 99-CV-3624 (E.D.N.Y. Apr. 22, 2002) 27

TABLE OF AUTHORITIES – Continued

Page

Day v. Crosby, 391 F.3d 1192 (11th Cir. 2004) 14, 29

DeCato v. United States, No. 00-2118, 51 Fed. Appx. 888 (1st Cir. Nov. 27, 2002) 16

Dory v. Ryan, 999 F.2d 679 (2d Cir. 1993), *modified on reh'g*, 25 F.3d 81 (2d Cir. 1994) 29

Duncan v. Walker, 533 U.S. 167 (2001) 28

Edgar Velez v. Walker, No. 02-CV-1732 (E.D.N.Y. Feb. 5, 2003), *adopted* (E.D.N.Y. Mar. 27, 2003) 27

Edwards v. United States, 266 F.3d 756 (7th Cir. 2001) 27

Eltayib v. United States, 294 F.3d 397 (2d Cir. 2002) 11

Faile v. Upjohn Co., 988 F.2d 985 (9th Cir. 1993) 27

Fernandez v. Artuz, 175 F. Supp. 2d 682 (S.D.N.Y. 2001) 26

Fernandez v. Artuz, 402 F.3d 111 (2d Cir. 2005) .....*passim*

Franklin v. Dretke, No. 04-40444, 106 Fed. Appx. 926 (5th Cir. Aug. 25, 2004) 14

Franklin v. Hightower, 215 F.3d 1196 (11th Cir. 2000) 15

Frazier v. Huffman 343 F.3d 780 (6th Cir. 2003) 16

Garvey v. Vaughn, 993 F.2d 776 (11th Cir. 1993) 27

Harrison v. Artuz, 105 F. Supp. 2d 101 (E.D.N.Y. 2000), *aff'd sub nom. Clark v. Barkley*, No. 00-2695, 51 Fed. Appx. 332 (2d Cir. Oct. 22, 2002) 12, 13

Houser v. Dretke, 395 F.3d 560 (5th Cir. 2004) 16

Houston v. Lack, 487 U.S. 266 (1988) .....*passim*

TABLE OF AUTHORITIES – Continued

Page

Hughes v. Dretke, 412 F.3d 582 (5th Cir. 2005) 15

In re Sims, 111 F.3d 45 (6th Cir. 1997) 26

Jones v. Keane, 329 F.3d 290 (2d Cir.), *cert. denied*, 540 U.S. 1046 (2003) 11

Kellogg v. Strack, 269 F.3d 100 (2d Cir. 2001) 11

Lewis v. Richmond City Police Dept., 947 F.2d 733 (4th Cir. 1991) 29

Lonchar v. Thomas, 517 U.S. 314 (1996) 25

Longenette v. Krusing, 322 F.3d 758 (3d Cir. 2003) 27

Marsh v. Soares, 223 F.3d 1217 (10th Cir. 2000) 27

Melancon v. Kaylo, 259 F.3d 401 (5th Cir. 2001) 21

Miller-El v. Cockrell, 537 U.S. 322 (2003) ..... *passim*

Moore v. Gibson, 250 F.3d 1295 (10th Cir.), *cert. denied*, 534 U.S. 1000 (2001) 21, 24

Morales v. Greiner, 381 F.3d 47 (2d Cir. 2004) 11

Nichols v. Bowersox, 172 F.3d 1068 (8th Cir. 1999) 26

Noble v. Kelly, 246 F.3d 93 (2d Cir.), *cert. denied*, 534 U.S. 886 (2001) 5, 6, 28

People v. Cain, 708 N.Y.S.2d 413 (N.Y. App. Div. 2000) 2, 3

People v. Cain, 735 N.E.2d 419 (N.Y. 2000) 3

People v. Langfelt, 249 N.Y.S.2d 949 (N.Y. App. Div. 1964) 18

Richard v. Ray, 290 F.3d 810 (6th Cir. 2002) 29

Rudenko v. Costello, 322 F.3d 168 (2d Cir. 2003) 11

TABLE OF AUTHORITIES – Continued

Page

Saffold v. Newland, 224 F.3d 1087 (9th Cir.), *amended by* 250 F.3d 1262 (9th Cir. 2000), *overruled on other grounds*, *Carey v. Saffold*, 536 U.S. 214 (2002) 21

Slack v. McDaniel, 529 U.S. 473 (2000) ..... *passim*

Sulik v. Taney County, Mo., 316 F.3d 813 (8th Cir. 2003) 27

Szuchon v. Lehman, 273 F.3d 299 (3d Cir. 2001) 17

Tapia-Ortiz v. Doe, 171 F.3d 150 (2d Cir. 1999) 29

United States v. Baldayaque, Nos. 3:95CR81, 3:99CV2272, 2002 WL 31094962 (D.Conn. Sept. 6, 2002) 12

United States v. Doe, 365 F.3d 150 (2d Cir.), *cert. denied*, 125 S.Ct. 449 (2004) 11

United States v. Lambros, 404 F.3d 1034 (8th Cir.), *cert. denied*, 125 S.Ct. 2953 (2005) 16

United States v. Outen, 286 F.3d 622 (2d Cir. 2002) 11

United States v. Springfield, 337 F.3d 1175 (10th Cir. 2003) 16

United States v. Vargas, 393 F.3d 172 (D.C. Cir. 2004), *reh'g denied*, 415 F.3d 23 (D.C. Cir. 2005) 16

United States v. Zuno-Arce, 339 F.3d 886 (9th Cir. 2003), *cert. denied*, 540 U.S. 1208 (2004) 16

Vroman v. Brigano, 346 F.3d 598 (6th Cir. 2003) 20

Walker v. Crosby, 341 F.3d 1240 (11th Cir. 2003) 14

Walker v. Warden, No. 04-30607, 125 Fed. Appx. 568 (5th Cir. Apr. 5, 2005) 14

TABLE OF AUTHORITIES – Continued

Page

Wampler v. Mills, No. 02-5447, 60 Fed. Appx. 594 (6th Cir. Apr. 2, 2003) 14, 15

Warner v. Glass, 135 S.W.3d 681 (Tex. 2004) 22

Williams v. Taylor, 529 U.S. 420 (2000) 6

Wong Sun v. United States, 371 U.S. 471 (1963) 8

STATUTES AND RULES

28 U.S.C. § 2244(d)(2) 18, 28

28 U.S.C. § 2253(c) ..... *passim*

2d Cir. R. 0.23 5

5th Cir. R. 47.5.4 14

6th Cir. R. 28(g) 14

Tex. R. Civ. P. 5 22

Tex. R. Crim. P. art 11.07 22

OTHER AUTHORITIES

Answer Brief of Appellee, *Day v. Crosby*, 391 F.3d 1192 (11th Cir. 2004) (No. 04-10778) 14

Answer Brief of Appellee, *Walker v. Crosby*, 341 F.3d 1240 (11th Cir. 2003) (No. 01-12491) 14

Appellee's Brief and Appendix, *Clark v. Barkley*, 51 Fed. Appx. 332 (2d Cir. Oct. 22, 2002) (No. 00-2695), *available on* Westlaw (no WL number) 13

Appellee's Brief and Appendix, *Harrison v. Artuz*, 12 Fed. Appx. 56 (2d Cir. June 15, 2001) (No. 00-2445), *available at* 2000 WL 33981691 13

TABLE OF AUTHORITIES – Continued

Page

Appendix to Brief for Petitioner-Appellant, *Fernandez v. Artuz*, 402 F.3d 111 (2d Cir. 2005) (No. 03-2541) ..... *passim*

Brief for Respondent-Appellee, *Bond v. Walsh*, 53 Fed. Appx. 162 (2d Cir. Sept. 27, 2002) (No. 02-2157), *available at* 2002 WL 32391985 12

Brief for Respondent-Appellee, *Brigian v. Artuz*, 37 Fed. Appx. 559 (2d Cir. June 18, 2002) (No. 01-2389) 12

Brief for the United States of America, *Baldayaque v. United States*, 338 F.3d 145 (2d Cir. 2003) (No. 02-2611), *available at* 2003 WL 23336105 12

COUNTERSTATEMENT OF THE CASE

Respondent Almein Cain is currently incarcerated in Attica Correctional Facility. He alleges that he did not commit the crime for which he was convicted, and that the conviction is the result of state procedures that violated his constitutional rights.

According to the facts cited in Cain's federal petition for a writ of habeas corpus and application for a Certificate of Appealability, on November 15, 1995, four people were shot to death during a botched holdup of a grocery store in Queens County, New York. *See* C.A. 7.[1] The only surviving victim of the crime, Eric Caraballo, reviewed thousands of mugshots in the hospital and did not at that time identify Cain as one of the perpetrators. *Id.* at 115. When asked in front of the grand jury to describe the gunman, Caraballo testified: "He was black, tall, *that's the only thing I could see* because from there I was taken to the back." *Id.* at 10 (emphasis added).

Approximately one month after the shootings, however, a man named Amaury Rosario gave a confession to the police that said he was involved in the crime, and which also implicated Respondent Almein Cain as a fellow perpetrator. C.A. 10. But Rosario later testified, first at a suppression hearing and then at his own trial, that his confession was unlawfully coerced through physical beatings and threats, and that he in fact had nothing to do with the crime. *Id.* at 9, 111. Rosario subsequently was acquitted of all charges. *Id.* at 21 n.12.

---

[1] Citations to "C.A." refer to the Appendix that Respondent Cain submitted to the Second Circuit with his principal appellate brief.

It was not until after Rosario's "confession" that Cain was arrested, based on the fact that Caraballo was suddenly able to identify Cain as one of the perpetrators. C.A. 9-10. The police, who were told by Caraballo that the gunman was between 18 and 21 years old, heavy-set and between 5'10" and 6' tall, placed Cain in a lineup. At 25 years old, 6'2" and 250 pounds, he was the only lineup participant who even came close to matching that physical description. *Id.* at 11. The five others in the lineup were all over 30 years old, and, as the arresting officer acknowledged, none of them matched Cain's weight or height. *Id.* In addition, when Cain attempted to challenge the lineup at a *Wade* hearing, the state produced a photograph of the lineup that depicted clearly only Cain and two others; the remaining three participants were "indescribable or unobservable." *Id.* at 10-11.

At Cain's 1997 trial, Caraballo named Cain as the gunman, and testified that he could see Cain's face, which he would "never forget" – this despite Caraballo's earlier grand jury testimony to the contrary. C.A. 14. Caraballo also indicated, however, that he may have been told what to look for at the lineup, testifying that "I [sic] not looking for the mustache because *I know the guy I have to pick out. . . .*" *Id.* at 16 n.8 (emphasis added). The jury convicted Cain of eight counts of Murder in the Second Degree, and on November 24, 1997, Cain was sentenced to an indeterminate term of incarceration of 130 years to life. *Id.* at 21.

On December 2, 1997, Cain filed a timely notice of appeal to the New York State Appellate Division, Second Department ("Second Department"). C.A. 41. On April 10, 2000, the Second Department affirmed the judgment of conviction. *People v. Cain*, 708 N.Y.S.2d 413 (N.Y. App. Div. 2000). On or about April 27, 2000, Cain sought leave to appeal to the New York Court of Appeals. C.A. at 51. That